SUPREME COURT, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1978

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

MOHAN L. MEHTA & RADHA R.M. NARUMANCHI,
Petitioners,

v.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, MICHAEL ADANTI, ALAN H. LEADER, DAVID C. NEWTON, KERRY GRANT, BARBARA BARD, MICHAEL R. BECKER, FRANK E. MUSKA, JERRY BANNISTER, MICHAEL PERNAL, DORIS GRISCOM, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

ROBERT W. GARVEY
Assistant Attorney General

JANE S. SCHOLL
Assistant Attorney General

THOMAS P. CLIFFORD, III
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel: (203) 566-3696

Counsel of Record for Respondents

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

1. Whether summary judgment can be granted before any discovery in free speech and civil rights actions?

2. Whether the Court of Appeals erred when it affirmed the District Court's decision dismissing the petitioners' claims since they had failed to exhaust their administrative remedies?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	4
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: **Page(s)**

Anderson v. Creighton, ____ U.S. ____, 107 S. Ct 3034 (1987) 7

Country Fairways, Inc. v. Mottaz, 539 F.2d 637 (7th Cir. 1976) 5

Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 2

First National Bank of Cincinnati v. Pepper, 454 F.2d 626, 636 (2d Cir. 1972) *appeal after remand* 547 F.2d 708 (2d Cir. 1976) 5

Mehta v. Board of Trustees, Civil Action No. N-86-302(PCD) (D. Conn.) 7

Mehta v. Board of Trustees, Dk. No. 87-7504 *slip op.* (2d Cir. 1987) 5

Narumanchi v. Board of Trustees, Civil Action No. H-86-51(PCD) (D. Conn.) 3, 5, 6, 7

Pfister v. Northern Illinois Finance Corporation, 317 U.S. 144 (1942) 2

Statutes:

28 U.S.C. § 2101 1

Rules:

Supreme Court Rule 20.4 1

Federal Rules of Appellate Procedure Rule 40 2

Federal Rules of Civil Procedure Rule 56 3

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was rendered upon a summary order which the court directed would not be published in the Federal Reporter and in which it stated that the decision should not be cited or otherwise relied upon in unrelated cases before that or any other court. (Appendix C to Petition, p. 010A).

The decision of the District Court is also unreported. It appears as Appendix D to the Petition for Writ of Certiorari, p. 011A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 9, 1987. A petition for rehearing was filed on December 29, 1987. The petition for rehearing was denied on March 1, 1988. The petition for writ of certiorari was filed on May 31, 1988.

28 U.S.C. § 2101 provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Rule 20.4 of the Supreme Court Rules states further that:

> The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

Pursuant to Rule 40 of the Rules of Appellate Procedure "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." The petition for rehearing here was filed twenty days after the entry of the judgment. It was, consequently, untimely. The petition was denied without comment by the Court of Appeals. (Appendix A to Petition, p. 001A). It is a well-established rule that "where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended." *Pfister v. Northern Illinois Finance Corporation*, 317 U.S. 144, 150 (1942).

Even assuming the filing of the request for rehearing did extend the time for the filing of the petition for writ of certiorari, the petition was still untimely filed. The petition for rehearing was denied on March 1, 1988 and the petition for writ of certiorari was filed on May 31, 1988, 91 days after the denial of the petition. When a petition for writ of certiorari is untimely it should be dismissed. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952).

Thus, the Court lacks jurisdiction of the petition and it should be dismissed.

STATEMENT OF THE CASE

In addition to the facts stated by the petitioners, this action, commenced September 4, 1986, was consolidated, at the request of the parties, with *Narumanchi v. Board of Trustees*, Civil Action No. H-86-51(PCD). That action had been commenced in January, 1986 and an expedited scheduling order was entered therein requiring that discovery be concluded by February 14, 1986. In light of the delay that had already occurred in the case, the court granted the plaintiffs' motion to amend in *Mehta* on December 10, 1986 subject to the condition that there be no further discovery. (Appendix E to Petition pp. 021A–022A). In any event, the plaintiffs had from September 4, 1986 to December 10, 1986 to conduct discovery. No discovery by the plaintiffs was conducted during that time.

On appeal to the United States Court of Appeals for the Second Circuit the plaintiffs raised only one issue: "Whether the District Court erred in employing summary judgment criteria to a motion pursuant to Fed. R. Civ. P. 56 when the movants failed to submit an affidavit, admissions or depositions in support of their motion on the constitutional claims."

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the Questions Presented in the petition.

The two questions presented in the petition are whether a summary judgment motion may be granted without prior discovery in an action raising constitutional claims and whether administrative remedies need to be exhausted in a claim raising constitutional and federal rights. But the Second Circuit did not decide these questions in this proceeding. Moreover, the facts of record will not support a determination of those questions by this Court.

A review of the one issue raised by the plaintiffs on appeal to the Second Circuit was the alleged failure of the defendants to submit an evidentiary affidavit with their summary judgment motion.

Plaintiffs did *not* raise, as they do now, that discovery must precede entry of summary judgment, nor did they timely preserve the issue of administrative exhaustion. Indeed a review of the Second Circuit's succinct opinion clearly reveals that the appellate court addressed the one issue which plaintiffs did raise, to wit, the alleged technical deficiency of the defendants' summary judgment motion in light of Fed. R. Civ. P. 56. The Second Circuit's opinion mirrors the issue raised by plaintiffs. As the Court of Appeals stated in affirming the District Court's judgment:

> 1. Appellants claim that summary judgment should not have been granted against them because their complaint was facially sufficient and therefore able to withstand a summary judgment motion accompanied by only an allegedly irrelevant affidavit. We do not think the affidavit submitted was irrelevant since it rebutted allegations of racial discrimination, denial of equal protection, and lack of due process.

2. Appellants claim that the district judge never ruled on their first amendment claims. However, we find that in its opinion dated January 28, 1987, the district court incorporated its ruling on that subject in the related case of Narumanchi v. Board of Trustees, H-86-51(PCD).

3. We affirm for the reasons given in Judge Dorsey's January 28, 1987, opinion. We have considered all of appellants' arguments for reversal and find them meritless.

Mehta v. Board of Trustees, Dk. No. 87-7504 *slip op.* (2d Cir. 1987), (Appendix A to Petition, pp. 003 at 005).

It is a well-settled rule of appellate practice that courts will not review on appeal an issue which was not raised in the trial court below. *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626, 636 (2d Cir. 1972) *appeal after remand* 547 F.2d 708 (2d Cir. 1976). Issues not raised in trial or on the pleadings cannot be presented for the first time on appeal, and a trial court should not be reversed on grounds that were never urged or argued below. *Country Fairways, Inc. v. Mottaz*, 539 F.2d 637 (7th Cir. 1976).

Plaintiffs waived their opportunity to preserve the questions raised in this petition. This is a simple case of faulty pleading and of a record that fails to preserve on appeal the questions which plaintiffs now seek to have this Court address. Based on both plaintiffs' failure to bring the issues to the attention of the District Court and Appellate Court below, and the very nature of the Second Circuit's opinion, limited to the one issue then raised by plaintiffs, denial of the petition by this Court is appropriate.

2. **Summary judgment may enter, under certain circumstances, without use of discovery, especially where petitioners had three months to conduct discovery and failed to do so.**

The complaint which is the subject of this petition was filed on September 4, 1986. More than three months passed during which plaintiffs had an opportunity to conduct discovery. On December 10, 1986, in ruling on plaintiffs' motion to file an amended complaint, the trial court granted the same on the condition that no *further* discovery would be permitted. This condition was premised on two vital facts. First, in January 1986 plaintiff Narumanchi filed an action against many of the same defendants claiming constitutional violations. *Narumanchi v. Board of Trustees*, Civil Action No. H-86-51(PCD). The *Narumanchi* complaint resulted in entry of a preliminary injunction against the State defendants and entry of an expedited scheduling order requiring discovery to be conducted by February 14, 1986. Despite the expedited scheduling order, Narumanchi filed several amendments to his complaint and, due to his lack of full compliance with discovery requests, was the subject of sanctions for delays in compliance with discovery. *Narumanchi v. Board of Trustees*, Civil Action No. H-86-51(PCD), *Ruling on Motion in Limine.*

Upon the filing of the *Mehta* complaint on September 4, 1986 the plaintiffs sought to consolidate this case with *Narumanchi*, which was granted by the trial court. In the *Mehta* complaint plaintiffs sought again to amend their original complaint which had been consolidated with *Narumanchi*. Since the original *Narumanchi* case had lingered for one year due to plaintiffs' delays and complaint amendments, the trial court, on December 10, 1986, allowed plaintiffs' counsel in *Mehta* the opportunity to amend their complaint but only on the condition that there be no further discovery. (Appendix E to Petition, p. 024A).[1] The United States District Court

[1] Petition incorrectly notes date of entry of order as December 16, 1986. It was filed on December 10, 1986.

had been lenient with plaintiff Narumanchi in Civil Action No. H-86-51(PCD) in allowing ample time for discovery. Indeed, in the appeal at bar, Civil Action No. N-86-302(PCD), plaintiffs had three months to conduct discovery up to Judge Dorsey's ruling on December 10, 1986. *Id.*

Against this important factual background petitioners' first question may be addressed.

Petitioners make no reference in their brief to the more than three months they had to conduct discovery. Moreover they conveniently omit the facts that they moved to consolidate this case with *Narumanchi* and the expedited discovery order imposed in the *Narumanchi* proceeding. Despite these facts plaintiffs sought to sit on their right to engage in discovery for more than three months until finally, on December 10, 1986 the District Court prohibited any further discovery. The unrebutted facts make clear that there was no abuse of discretion by the court.

This Court has held that a summary judgment motion may be granted without discovery based on the particular record before the trial court. *Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987). In rejecting a claim that "some discovery would be required before Anderson's summary judgment motion could be granted" the Court held that the particular facts of a case dictate whether summary judgment should enter. *Id.* at 3042. *Anderson* dealt with a qualified immunity question insofar as the defendant was an FBI agent and the defendant moved for summary judgment on qualified immunity grounds. The Court noted:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery.

Id. at 3042, pg. 6.

The petitioners here would have this Court believe that they were deprived of the opportunity to conduct discovery when in fact they had such an opportunity but did not utilize it. The District Court did not bar further discovery until December 10, 1986 with the passage of more than three months from the filing of the action on September 4, 1986. Nothing prevented Mehta and Narumanchi from conducting further depositions or serving additional interrogatories during that time. Their failure to conduct discovery, which was of their own doing, cannot now be heard to prejudice plaintiffs' ability to respond to the defendants' motion to dismiss or for summary judgment.

The real question posed is not whether summary judgment may enter "before discovery" but whether summary judgment may enter after plaintiffs have waived an opportunity for discovery. Such is not a substantial federal question but rather an issue so unique to the particular prosecution by the plaintiffs of this case so as to preclude review by this Court.

3. The availability of procedures set forth in a collective bargaining agreement may be considered by a trial court in determining a summary judgment motion, even when constitutional claims are raised.

Again it must be emphasized that the exhaustion issue raised here for the first time was not asserted by the plaintiffs before the trial court or the Court of Appeals and therefore, must be considered waived.

Assuming arguendo that plaintiffs' claim is timely, the trial court and the Court of Appeals correctly noted that plaintiffs had a wide array of contractually-bargained-for rights under the collective bargaining agreement. The issue raised is not one of great moment for the federal judiciary. Simply, as the decisions by both the trial court and the appellate court make clear, the summary judgment motion contained support-

ing affidavits and exhibits. Conversely, plaintiffs did not file any counter affidavits nor counter exhibits. Indeed, the plaintiffs' own opposing memorandum to defendants' motion to dismiss or for summary judgment was filed twelve days late. (Appendix D to Petition, p. 015A). Accordingly the trial court had an adequate basis upon which to enter judgment in favor of the defendants on the plaintiffs' claims, and the Second Circuit affirmed.

There is no substantial federal question presented, only one of lackluster prosecution of the plaintiffs' complaint and the attendant consequences of trivializing both Local and Federal Rules of Civil Procedure. Accordingly, plaintiffs' petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

THE BOARD OF TRUSTEES OF THE CONNECTICUT STATE UNIVERSITIES, ET AL., RESPONDENTS

BY: JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

ROBERT W. GARVEY
Assistant Attorney General

JANE S. SCHOLL
Assistant Attorney General

THOMAS P. CLIFFORD, III
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel: (203) 566-3696